Transport for NSW

Statutory Review Report

Roads and Crimes Legislation Amendment Act 2022.

October 2024

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NSW GOVERNMENT

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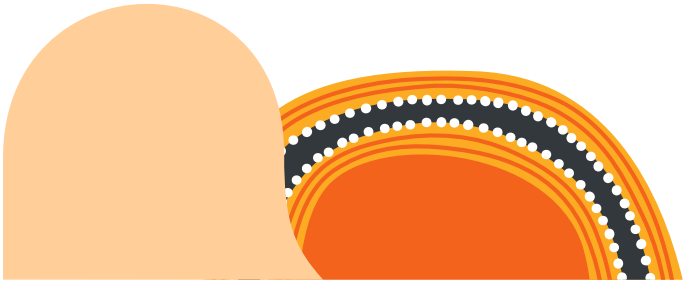

1. Executive Summary

On 1 April 2022 amendments to both the *Roads Act 1993* and the *Crimes Act 1900* were introduced by the *Roads Crimes Legislation Amendment Act 2022* to create offences for certain behaviour that causes damage or disruption to major roads or major public facilities.

Section 144H of the Roads Act requires that the Minister must review the Division to determine whether the policy objectives of the Division remain valid and whether the terms of the Division remain appropriate for securing these objectives.

Section 144H also provides that the review must be undertaken as soon as possible after the period of two years from the commencement of the *Roads and Crimes Legislation Amendment Act 2022* and a report on the outcome of the review to be tabled in each House of Parliament within 6 months after the end of the period of two years (i.e., by 1 October 2024).

Transport undertook targeted consultation with other NSW Government agencies that have an interest, or play a role in, the provisions contained in Part 9, Division 7 of the Roads Act. An extract of Part 9 of the Act and the relevant Regulatory provision (Clause 48A of the Roads Regulation 2018) is at **Appendix A**.

The opportunity for comment from the wider community was also provided via the NSW Government 'Have your say' webpage with invitations for submissions opening on the 26 April 2024 and closing on 1 June 2024. An extension until 5 June 2024 was also granted to several stakeholder who requested additional time.

The review has found that the objectives of the Act remain valid and its provisions remain appropriate for pursuing those objectives. Accordingly, no legislative changes are recommended. However, the report did highlight some issues with interpretation and enforcement of the expanded offence provisions and makes the following two recommendations:

1. That a cross government Working Group comprising key stakeholder agencies be established to investigate difficulties with interpretation and enforcement of the legislation, and
2. 2) That an administrative review be conducted in 3 years to further assess the operation of the amended provisions.

Note: While changes were also made to the Crimes Act on 1 April 2022, this report focusses only on the amendments made to the Roads Act.

The Department of Communities and Justice is responsible for the review of the changes made to the Crimes Act on behalf of the Attorney General with its report also to be tabled in both Houses of Parliament by October 2024.

2. Background of Part 9, Division 7 of the *Roads Act 1993.*

Section 144G of the Roads Act was first introduced on 3 December 2018 by the *Road Transport Legislation Amendment (Penalties and Other Sanctions) Act 2018* to create offences for a person to enter, remain on, climb, jump from or otherwise trespass on the Sydney Harbour Bridge or any other major bridge or tunnel prescribed by the regulations if that conduct causes damage to the bridge or tunnel, or seriously disrupts or obstructs vehicles or pedestrians.

The offence under section 144G is punishable by a maximum court fine of up to $22,000, two years imprisonment or both.

The 2018 changes were in response to an incident where a person climbed the pylon of the Sydney Harbour Bridge and caused prolonged disruption to the transport network while a police operation was undertaken to remove the person. No other major bridges or tunnels were initially prescribed for the purpose of the offences under the section at the time on the 2018 changes.

On 1 April 2022, section 144G was further amended by the *Roads Crimes Legislation Amendment Act 2022* to also cover major roads as prescribed by the Regulations. The amendment was made in response to illegal protest activity which was causing significant disruption to the road transport network. In one incident, a group of protesters positioned themselves across city bound lanes on the Spit Bridge in Mosman causing the morning peak traffic to come to a virtual standstill. Protest groups also forewarned that future protest activity of this type would continue to occur at other locations across NSW.

It is estimated that protests of this nature, which cause significant disruption to the transport network, result in financial costs that run into the millions of dollars through direct economic loss and lost productivity.

The amendments to the Roads Act expanded the scope of offences under section 144G of the *Roads Act 1993* to also cover major roads as prescribed by the Regulations. The changes to section 144G were done in conjunction with several Regulation amendments that were undertaken to prescribe other bridges, tunnels, and roads for the purposes of the offence provisions of the section. Further details on each of these Regulation amendments is detailed at section 3 below.

An amendment was also made to remove subsection 144G (1)(c) of the Act, which referred to offences committed under the *Summary Offences Act 1988*. Offences under this Act include those such as the possession of alcohol by a minor, which is punishable by a fine of $20. This meant that under section 144G of the Roads Act, as it was previously constructed, a person under the age of 18 who is found in possession of alcohol on a prescribed bridge or tunnel, for example, could be subject to the increased penalties of up to $22,000, two years' imprisonment, or both.

The *Summary Offences Act 1988* also includes other offences of a similarly minor nature, like offensive language and drunk and disorderly offences. It is not the intended policy outcome for people who commit such minor infractions to face penalties of up to $22,000 and/or two years' imprisonment. Accordingly, the provisions of subsection 144G(1)(c) was repealed on 1 April 2022 by the *Roads Crimes Legislation Amendment Act 2022.*

While the offence provisions already contained safeguards in certain circumstances (e.g., conduct arising from a mechanical fault or breakdown of a motor vehicle), the changes on 1 April 2022 also introduced new subsections to expand these safeguards to include other conduct. This included subsection 144G(4A) to provide that a person does not commit an offence if the conduct occurs at the workplace at which the person works, or at a workplace owned, occupied, or operated or used by an employer of the person. Subsection 144G(4B) also provides that the section does not apply to the extent that it prohibits conduct in relation to Parliament House, or an office of a member of parliament.

Further, under subsection 144G(5A), a person does not commit an offence under the section if the conduct forms part of industrial action, an industrial dispute, or an industrial campaign.

These amendments to provide additional safeguards were not part of the original Bill that was introduced by the then Government but were agreed to during the passage of the Bill through the Houses of Parliament.

Lastly, a further amendment to the Bill agreed to during the debates was that the changes introduced on 1 April 2022 should be subject to review after a period of operation. This resulted in a new section 144H being introduced into the Roads Act which, as stated in the Executive Summary to this report, is where the requirement for the Minister to review the changes after two years of operation is contained.

3. Supporting Regulatory changes

In conjunction with the introduction of the *Roads and Crimes Legislation Amendment Act 2022* to the NSW Parliament, several amendments were also made to the Roads Regulation 2018. These changes are detailed below.

Roads Amendment (Major Bridges and Tunnels) Regulation 2022

On 24 March 2022, the Roads Regulation 2018 was amended to introduce a new clause 48A to prescribe all bridges and road tunnels within Greater Sydney Region for the purposes of an offence under section 144G of the *Roads Act 1993*.

Roads Amendment (Major Bridges and Tunnels) Regulation (No 2) 2022

On 1 April 2022, Clause 48A of the Roads Regulation 2018 was further amended to include bridges and tunnels in the cities of Newcastle and Wollongong, or a bridge or tunnel that joins a main road, a highway or freeway in NSW.

Roads Amendment (Major Roads) Regulation 2022

Following the changes introduced by the *Roads and Crimes Legislation Amendment Act 2022* to expand the offence provisions under section 144G to include a road as prescribed by the Regulations, a third amendment to clause 48A of the Roads Regulation 2018 was made on 5 April 2022 to so prescribe a road as being a main road, a highway, a freeway, a tollway, or a bridge or tunnel that joins a main road, highway, freeway, or tollway.

4. Other issues

Legislation Review Committee

The Legislation Review Committee reviews and reports on any Regulation that impacts on personal rights and liberties. In this regard, the Legislation Review Digest No. 42/57 – 10 May 2022 contains comments on the Roads Amendment (Major Bridges and Tunnels) Regulation 2022. The Chair of the Legislation Review Committee wrote to the then Minister noting that the amending Regulation may trespass on personal rights and liberties.

The amendment was made in response to illegal protest activity in Sydney which was causing significant disruption to the transport network. This resulted in severe financial impacts with the cost of recent protest activities estimated to run into the millions of dollars through direct economic loss and lost productivity.

While the Regulation amendment was made by the then Minister of the former Government, the current NSW Government continues to support the rights of all individuals to participate in lawful protest.

The amendments made by the Roads Amendment (Major Bridges and Tunnels) Regulation 2022 do not target protest action that is lawful. Most peaceful protest action will not fall foul of any existing laws and, accordingly, not the offences that can apply under the Roads Act.

Motion to disallow the Roads Amendment (Major Bridges and Tunnels) Regulation 2022

On 31 March 2022, a motion under section 41 of the *Interpretation Act 1987*, was moved in the Legislative Council to disallow the Roads Amendment (Major Bridges and Tunnels) Regulation 2022, published on the NSW Legislation website on 24 March 2022.

The motion was negatived 33 to four.

Supreme Court Challenge (Kvelde v State of New South Wales [2023] NSWSC 1560)

On 12 October 2022, a Supreme Court matter was brought by members of the 'Knitting Nannas' (a climate change advocacy group), who claimed that the new laws in the Crimes Act were unconstitutional and the laws that were contained in the Roads Regulation went beyond the regulation making power allowed by the Roads Act to create such offences.

The principal issues for the Court were:

> **1.** Whether section 214A of the *Crimes Act 1900* was invalid because it infringed upon the implied freedom of political communication ("the implied freedom") and thus, is beyond the power of the Parliament of NSW; and
>
> **2.** Whether clause 48A(1) of the Roads Regulation 2018 was invalid because it went beyond the regulation making power allowed by the Roads Act to create such offences.

On 13 December 2023 the NSW Supreme Court handed down its decision in the matter.

The Supreme Court found in favour of the plaintiffs and held that sections 214A(1)(c) and 214A(1)(d) of the *Crimes Act 1900* (NSW), to the extent that the paragraph made it an offence for persons engaged in the conduct specified in the paragraph to cause part of the major facility to be closed or cause

persons attempting to use the major facility to be redirected, were invalid because the provision, to that extent, impermissibly burdens the implied freedom of political communication contrary to the Commonwealth Constitution.

Importantly for TfNSW and the Transport and Roads ministers, the Roads Act and Roads Regulation laws were made legally and are therefore valid. This means that NSW Police can enforce all the laws in the Roads Act and its Regulation relating to conduct that causes damage to bridges, tunnels, or roads, or the conduct seriously disrupts or obstructs vehicles or pedestrians attempting to use the bridge, tunnel, or road.

The Supreme Court's ruling on the Crimes Act provisions are a matter for the Attorney General and, therefore, are addressed as part of their Statutory Review report.

5. Charges and court outcomes

There are two offences under section 144G of the Roads Act. These are:

s144G (1)(a) – A person must not enter, remain on, climb, jump from or otherwise trespass on any part of the Sydney Harbour Bridge or any other major bridge, tunnel, or road if that conduct causes damage to the bridge, tunnel, or road.

s144G(1)(b) - A person must not enter, remain on, climb, jump from or otherwise trespass on any part of the Sydney Harbour Bridge or any other major bridge, tunnel, or road if that conduct seriously disrupts or obstructs vehicles or pedestrians attempting to use the bridge, tunnel, or road.

Both offences are punishable by a maximum court imposed fine of $22,000, 2 years imprisonment, or both.

Data provided by the NSW Bureau of Crime Statistics and Research (BOCSAR) show that in the two-year period since the new laws came into effect (1 April 2022 – 1 April 2024) no person was charged with an offence under section 144G(1)(a) of the Roads Act.

In the same period there were 39 matters for offences under section 144G(1)(b). Of these, the BOCSAR figures show that a total of 13 were proven, 25 were withdrawn by the prosecution and 1 dismissed by the lower court under mental health or cognitive impairment, mentally ill or disordered grounds.

Further analysis indicates that in most instances the charge was withdrawn, and a guilty plea was entered to a lesser offence under s 236(2) of the Road Rules 2014 for 'a pedestrian obstructing a driver's or other pedestrian's path'. This offence attracts a maximum court fine of $2,200 and a level 1 penalty notice fine (currently $91) which is consistent with other offences that apply to pedestrians.

6. Conduct of the review

Section 144H of the Roads Act requires that the Minister, being the Minister for Roads, must review the Division to determine whether the policy objectives of the Division remain valid and whether the terms of the Division remain appropriate for securing these objectives.

Section 144H also provides that the review must be undertaken as soon as possible after the period of two years from the commencement of the *Roads and Crimes Legislation Amendment Act 2022* and a report on the outcome of the review to be tabled in each House of Parliament within 6 months after the end of the period of two years (i.e., by 1 October 2024). Transport for NSW (Transport) conducted the review on behalf of the Minister for Roads.

Transport undertook targeted consultation with other NSW Government agencies that have an interest, or play a role in, the provisions contained in Part 9, Division 7 of the Roads Act. These include:

- NSW Police
- Department of Communities and Justice, and
- Chief Magistrate's Office

An open letter was sent to the Premier, Attorney General, and Minister for Roads in April 2024 from the NSW Council for Civil Liberties calling for the laws to be repealed and also that the review seek public submissions. The letter was undersigned by many of the stakeholders listed below who also made individual submissions. These include:

- Community Legal Centres NSW
- Animal Liberation NSW
- Australian Services Union NSW ACT Services Branch
- Public Interest Advocacy Centre
- Pittwater Knitting Nannas
- Wage Peace
- Australian Lawyers for Human Rights
- Inner City Legal Centre
- National Justice Project
- Australia Palestine Advocacy Network
- Australia National Imams Council
- Tzedek Collective
- Socialist Alliance
- City of Sydney for Palestine
- Water for Rivers
- Tomorrow Movement
- Muslim Women Australia
- Jewish Council of Australia
- Pride in Protest
- Trade Unionists for Palestine
- Human Rights Act for NSW
- NSW Teachers Federation

- Jews against the Occupation ‘48
- Abigail Boyd MLC
- Amanda Cohn MLC
- Cate Faehrmann MLC
- Sue Higginson MLC
- Jenny Leong, Member for Newtown
- Kobi Shetty, Member for Balmain
- Tamara Smith, Member for Ballina

The opportunity for comment from the wider community was also provided via the NSW Government ‘Have your say’ webpage with invitations for submissions opening on the 26 April 2024 and closing on 1 June 2024. An extension until 5 June 2024 was also granted to several stakeholder who requested additional time.

At the close of the consultation period, Transport had received 1,462 submissions with the vast majority (1,440) submitted via two organisations (Campaign Now and Do Gooder) that allow subscribers to utilise online direct email services to add their voice to certain campaigns.

There were also 20 submissions from the following organisations:

- Human Rights Law Centre*
- Young Labor Left of NSW*
- Law Society of NSW
- Marrickville Peace Group
- Redfern Legal Centre*
- Maritime Union of Australia, Sydney Branch*
- UTS Jumbunna Institute for Education and Research
- Nature Conservation Council of NSW*
- Australian Democracy Network*
- Legal Observers NSW*
- NSW Council for Civil Liberties
- Western Sydney University, School of Law
- Sydney Knitting Nannas and Friends*
- NSW Nurses and Midwives’ Association
- CFMEU NSW
- National Tertiary Education Union
- Unions NSW
- UTS faculty of law
- Amnesty International Australia*

- NSW Police Force

*Denotes those who also were signatories to the open letter to the Premier.

There were two individual members of the public who made submissions on their own behalf.

7. Feedback and discussion

Of the submissions that were received, all but one called on the government to repeal or make changes to the legislation to reduce the penalties. As noted in section 6 of this report, the vast majority of submissions (1,440) received at the close of the consultation period came via two organisations that allow subscribers to utilise online direct email services to add their voice to certain campaigns. These submissions were substantially the same with some slight variations made by individuals to include personal statements but were otherwise consistent in their messaging.

The main issues raised during the Statutory Review include:

- The legislative changes introduced by the former government were an unacceptable attack on freedom of political communication.
- The laws were not necessary to achieve their objective and further, that it was an unreasonable infringement on the freedom of political communication.
- Penalties of imprisonment for protesting is a disproportionate outcome.
- the government should additionally consider the introduction of legislative protection for the right to protest, including possible changes to the *Summary Offences Act 1988* to improve the process for authorising public assemblies.
- Introduction of a Human Rights Act into NSW legislation to provide a legal framework for the protection of human rights across various domains.

Other issues and recommendations raised include:

- Reducing the maximum court fine from $22,000 to a lesser amount ($3,500).
- Lessen the scope of the offence to only apply in cases of damage caused to roads or infrastructure or continuing to engage in activities designed to hinder or obstruct high volume traffic, other than roads within any CBD, after being directed by police to leave the road or related infrastructure in question.

As noted in section 5 of this report of the 39 matters in the where Police charged a person with an offence under s144G(1)(b) of the Roads Act for obstructing vehicle or pedestrian movements, 25 were withdrawn by the prosecution. In most cases, a guilty plea was entered into for an alternative lesser charge to the offence under s 236(2) of the Road Rules 2014 for ‘obstructing a driver’s or other pedestrian’s path’.

While the changes to the Roads Act simply expanded the bridge and tunnels power to major roads, the review did identify several issues that could be more effectively addressed through supporting guidelines, policy, and education, rather than legislative changes.

8. Conclusion and recommendations

The changes that were introduced on 1 April 2022 by the *Roads and Crimes Legislation Amendment Act 2022* were specifically aimed to capture the disruptive conduct that impacts the freedoms of others using the NSW transport network.

With respect to the changes that were made to the Roads Act, the objective was to create greater deterrence to these incidents from continuing to occur by expanding the pre-existing offence provisions that applied to the Sydney Harbour Bridge and other major bridges and tunnels prescribed by the Regulations, to also include major roads as also prescribed.

The Review concludes that the policy objectives of the amendments to the Roads Act remain valid and its provisions remain appropriate for pursuing those objectives. Accordingly, no legislative changes are recommended at this time.

However, the report did highlight some issues with interpretation and enforcement of the expanded offence provisions and makes the following two recommendations:

Recommendation 1 - That a cross government working group comprising key stakeholder agencies be established to investigate difficulties with interpretation and enforcement of the legislation.

As noted earlier in this report, the *Roads and Crimes Legislation Amendment Act 202*2 made changes to both the *Roads Act 1993* and the *Crimes Act 1900* were introduced by the *Roads Crimes Legislation Amendment Act 2022* to create offences for certain behaviour that causes damage or disruption to major roads or major public facilities.

While this report focusses on the expanded provisions of the Roads Act offences under section 144G of the Act, the Department of Communities and Justice undertook a simultaneous review of Part 4AF of the Crimes Act as required by section 214B of that Act.

This meant that a number of stakeholder submissions were sent to both agencies and, apart from requests to repeal the legislative changes introduced in April 2022, many also called for broader reforms to regulate protest activities that are outside the scope of both reviews.

For this reason, it is recommended that the Department of Communities and Justice lead the working group and include other key stakeholder agencies such as Transport for NSW, and the NSW Police Force. The working group will consider issues raises that were out of scope of the Statutory Review and report its findings to Government within 12 months' time.

Recommendation 2 - That an administrative review be conducted in 3 years to further assess the operation of the expanded provisions.

Section 144H of the Roads Act requires that the Minister must review the Division to determine whether the policy objectives of the Division remain valid and whether the terms of the Division remain appropriate for securing these objectives.

Section 144H also provides that the review be undertaken as soon as possible after the period of two years from the commencement of the *Roads and Crimes Legislation Amendment Act 2022* (which was April 2022*)* and a report on the outcome of the review to be tabled in each House of Parliament within 6 months after the end of the period of two years.

The Statutory Review and this report satisfy the legislative requirement of the Minister.

However, given the relatively short time that the provisions have been in operation, and in light of issues raised in the NSW Police submission that are to be further examined by the working group (recommendation 1), it is recommended that a further review of the operation of the provisions of the Roads Act be conducted in three years' time to further assess the operation of these provisions.

Similar to the Statutory Review process, the further review would be conducted simultaneously with a review of the provisions of the Crimes Act by the Department of Communities and Justice.

Appendix A

Roads Act 1993, Part 9, Division 7 - Trespassing on Sydney Harbour Bridge and other major bridges, tunnels and roads

144G - Damage, disruption or obstruction of Sydney Harbour Bridge and other major bridges, tunnels and roads

(1) A person must not enter, remain on, climb, jump from or otherwise trespass on any part of the Sydney Harbour Bridge or any other major bridge, tunnel or road if that conduct—

(a) causes damage to the bridge, tunnel or road, or

(b) seriously disrupts or obstructs vehicles or pedestrians attempting to use the bridge, tunnel or road.

(c) (Repealed)

Maximum penalty—200 penalty units or imprisonment for 2 years, or both.

(2) Without limiting subsection (1) (b), a person seriously disrupts or obstructs vehicles or pedestrians attempting to use the bridge, tunnel or road if, as a result of the person's conduct, the bridge, tunnel or road (or any part of the bridge, tunnel or road) is closed or vehicles or pedestrians are redirected.

(3) Nothing in this section prohibits conduct in accordance with the consent or authority of TfNSW, the NSW Police Force or other public authority.

(4) It is a defence to the prosecution of an offence against this section if the person charged proves that the person had a reasonable excuse for the conduct concerned.

(4A) A person does not commit an offence under this section if the conduct occurs—

(a) at the workplace at which the person works, or

(b) at a workplace owned, occupied, operated or used by an employer of the person.

(4B) This section does not apply to the extent that it prohibits conduct in relation to—

(a) Parliament House, or

(b) an office of a member of parliament.

(5) For the purposes of subsection (4) but without limiting that subsection, a person has a reasonable excuse if the conduct arose from a mechanical fault or breakdown of a motor vehicle.

(5A) A person does not commit an offence under this section if the conduct forms part of the following—

(a) industrial action,

(b) an industrial dispute,

(c) an industrial campaign.

(6) In this section—

major bridge, tunnel or road means a bridge, tunnel or road prescribed by the regulations for the purposes of this section.

Vehicle includes a train.

144H - Review of Division

(1) The Minister must review this Division to determine whether the policy objectives of the Division remain valid and whether the terms of the Division remain appropriate for securing those objectives.

(2) The review must be undertaken as soon as possible after the period of 2 years from the commencement of the *Roads and Crimes Legislation Amendment Act 2022*.

(3) A report on the outcome of the review must be tabled in each House of Parliament within 6 months after the end of the period of 2 years.

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Roads Regulation 2018, clause 48A - Major bridge, tunnel or road

(1) For the Act, section 144G, definition of ***major bridge, tunnel or road***, the following are prescribed for the purposes of that section—

(a) a main road,

(b) a highway,

(c) a freeway,

(d) a tollway,

(e) a bridge or tunnel that joins a road referred to in paragraphs (a)–(d),

(f) a bridge or tunnel in—

(i) the Greater Sydney Region, or

(ii) the City of Newcastle, or

(iii) the City of Wollongong.

Example—

the Spit Bridge across Middle Harbour

(2) In this clause—

Greater Sydney Region has the same meaning as in the *Greater Sydney Commission Act 2015*, as in force on the commencement of this clause.

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